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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM MICHAEL TINSLEY ..... Petitioner

V.

COMMONWEALTH
OF KENTUCKY ..... Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion below is styled *Tinsley v. Commonwealth*, Ky. 495 S. W. 2d 776 (1973).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1277(3).

QUESTIONS PRESENTED

I. WHETHER THE CONDUCT OF A CODEFENDANT'S ATTORNEY RESULTED IN PETITIONER BEING DEPRIVED OF HIS RIGHT TO A FAIR TRIAL.

II. WHETHER THE TRIAL COURT'S FAILURE TO GRANT PETITIONER A SEVERANCE DENIED PETITIONER THE RIGHT OF A FAIR TRIAL.

III. WHETHER THE PETITIONER'S PRIVILEGE AGAINST SELF INCRIMINATION WAS VIOLATED BY INDIRECT REFERENCES TO PETITIONER'S FAILURE TO TESTIFY.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner relies upon the following Amendments to the United States Constitution, which state as follows:

CONSTITUTION OF THE UNITED STATES. AMENDMENT V

No person shall be held to answer for a capitol or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness with[illegible] due process of law; nor shall private property be taken for public use without just compensation.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, SECTION 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ARGUMENT

I.

THE CONDUCT OF PETITIONER'S CODEFENDANT'S COUNSEL DID NOT DEPRIVE PETITIONER OF HIS RIGHT TO FAIR AND IMPARTIAL TRIAL.

Petitioner contends that the conduct of his codefendant's counsel, The Honorable Daniel T. Taylor, III, prejudiced his right to a fair trial.

Petitioner cites many examples of Mr. Taylor's trial technique as proof of the prejudicial behavior that allegedly influenced the jury. The fact is that Mr. Taylor was so carried away with his defense of his client that he was adjudged guilty of contempt on nine (9) different occasions.

We have no hesitancy in saying that a given defendant under a given factual situation can be prejudiced by the acts of his codefendant's counsel.

Here the factual situation is not one which is conducive for making a strong case of prejudice. As the Kentucky Court of Appeals stated in its opinion:

> "Without going into tedious detail we conclude from the entire record that in view of the overwhelming evidence of guilt we could not infer any substantial possibility of resulting prejudice in the minds of the jury against Michael as a consequence of the conduct of Narvel's lawyer."

Thus any alleged prejudice resulting from the acts of the petitioner's codefendant's counsel shrinks to insignificance in view of the evidence presented and

is harmless beyond a reasonable doubt. It is unlikely that the jury would have been any less persuaded in finding petitioner guilty without the acts of codefendant's counsel. See: *Harrington* v. *California,* 395 U. S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969) and *Schneble* v. *Florida,* 405 U. S. 427, 92 S. Ct. 1056, 31 L. Ed. 2d 340 (1972).

II.

THE TRIAL COURT'S FAILURE TO GRANT PETITIONER A SEVERANCE DID NOT DENY HIM A FAIR TRIAL.

Petitioner urges that the failure of the trial court to grant a severance was prejudicial to his right of a fair trial. Both defendants claimed prejudice by the failure of the lower court to grant each a separate trial.

The Kentucky Court of Appeals based its decision on its interpretation of the Kentucky Civil Rule 9.16 (criminal) which provides that a separate trial shall be granted if it appears that a defendant or defendants will be prejudiced by a joint trial. The Court of Appeals concluded that each defendant's defenses were not antagonistic or hostile within the purview of Rule 9. 16.

Furthermore in view of the state court reliance on any interpretation of a Kentucky procedural rule we seriously question whether a substantial federal question is squarely presented for this Court's consideration. See *California* v. *Krizda,* .... U. S. ...., 93 S. Ct. 32, ... L. Ed. 2d .... (1972).

III.

PETITIONER'S PRIVILEGE AGAINST SELF INCRIMINATION WAS NOT VIOLATED BY INDIRECT REFERENCES TO HIS FAILURE TO TESTIFY.

Finally petitioner contends that his privilege against self incrimination was violated by references to his failure to take the stand.

As the Court of Appeals of Kentucky noted in its opinion:

> "The test as concerns indirect comments is whether the comment is reasonably certain to direct the jury's attention to the defendant's failure to testify. Neal v. Commonwealth, Ky., 302 S. W. 2d 573. These inferences did not direct the jury's attention to Michael's failure to testify so as to violate the constitutional and statutory prohibition. We believe in view of the entire record, these inferential comments constituted harmless error beyond a reasonable doubt. See Chapman v. California, 386 U. S. 18, 17 L. Ed 2d 705, 87 S. Ct. 824.

The comments complained of by petitioner were "if the brother cares to offer a defense"; "Michael shot him and we have not heard one single bit of evidence to the contrary"; "Michael charged his field and got him. Has anyone said he didn't? No." These comments can hardly be construed as a blatant comment on petitioner's basis right not to take the stand and testify.

In view of the overwhelming evidence presented at trial we urge that the jury would not have been sufficiently influenced by these indirect remarks.

CONCLUSION

The trial court and the Kentucky Court of Appeals opinions are clearly supported by the evidence and in view of the overwhelming evidence of guilt we urge that any constitutional error would be harmless beyond a reasonable doubt.

Respectfully submitted,

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